In the

Supreme Court of the United States

OCTOBER TERM, 1949

No. 172

HARRY W. SCHUERMANN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING

Comes now petitioner and respectfully petitions the Court to set aside the order entered on October 10, 1949, denying certiorari, and to grant petitioner a rehearing of his petition for certiorari.

For grounds of this petition, petitioner states as follows:

1. Subsequent to the filing of the petition herein for certiorari there was filed in this Court a petition on behalf of J. Baker Bryan, Sr., for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit (No. 178). The Court granted this petition on October 10, 1949. Certiorari was sought in the instant case for the reason, among others, that the decision of the Eighth Circuit against peti-

tioner was directly in conflict with the decision of the Fifth Circuit in the case of **Bryan v. United States**, 175 F. (2d) 223. The Eighth Circuit Court of Appeals held that although the case against petitioner was based upon the net worth-expenditure method the trial court did not err in denying petitioner's motion for a judgment of acquittal and submitting the case to the jury even though there was no evidence of defendant's net worth and the evidence showed little more than that the aggregate amount of petitioner's expenditures and investments exceeded reported net taxable income. The Fifth Circuit Court of Appeals held that since the case against Bryan was based upon net worth-expenditure method a prima facie case was not made against him and the case should not have been submitted to the jury because the Government failed to prove Bryan's net worth at the starting point. The decisions are squarely in conflict with each other. It is true that the point on which certiorari was granted in the **Bryan** case is not the precise question involved in the petition herein, but the fact that certiorari was granted is a circumstance which should be taken into account by this Court in ruling the merits of the present petition. If this Court should hold that the Court of Appeals for the Fifth Circuit properly remanded the case for a retrial, then the question still remains as to whether the Eighth Circuit or the original Fifth Circuit decision states the proper rule to be applied. On the other hand, if this Court should hold that Bryan was entitled to a judgment of acquittal, then the necessary consequence is that whether one must serve a term in the penitentiary is dependent upon the accident of residence. It is not consonant with justice to permit one rule of law to apply in one part of the country and another rule to apply in another part. Petitioner submits that uniformity of decisions should impel this Court to consider the questions involved in the instant petition.

2. The very fact that certiorari was denied in this case will have an important ultimate effect in income tax evasion prosecutions. The decision of the Eighth Circuit Court of Appeals to the effect that on appeals in such cases reliance must be placed upon the judgment of the trial court in appraising the sufficiency of the evidence is a clear notice to defendants that once the District Court has denied a motion for a judgment of acquittal such action is for all intents and purposes final and the appeal is futile. The result is to perpetuate the error of the Court of Appeals in holding that a net worth-expenditure case may be made without proof of net worth. Petitioner submits that this Court could not have been aware of the significance of the decision in this case as it affects both prosecutions and civil income tax cases. The denial of certiorari has the effect of giving carte blanche authority to the courts and Government officials in utilizing the net worth-expenditure method of computing net income without establishing the taxpayer's net worth at the starting point by relying on suspicion and guesswork. The recent tendency of the courts has been to yield to Government pressure in order to facilitate convictions in tax evasion cases, and aside from the lone decision of the Fifth Circuit, the courts take the easy way out by deferring to the judgment of the lower court. This makes for unsound law and departures from accepted principles of due process.

3. By holding that petitioner was not entitled to a reversal of the judgment on account of the failure of the trial court to instruct the jury that the fact that petitioner did not testify created no presumption against him, the Court of Appeals below deprived petitioner of his liberty without due process of law. This ground was not previously presented although available to petitioner. The fact that petitioner was entitled to such an instruction and that the

failure to give it was error affecting petitioner's substantial rights is not disputed, and cannot be, under the decision of **Bruno v. United States,** 308 U. S. 287. The fact that the trial court was under a duty to give the instruction, coupled with the further fact that the Court of Appeals considered the question, makes it clear that the so-called "fatal" procedural error on the part of petitioner's trial counsel should not be given the effect of depriving petitioner of his right to a reversal by reason of the conceded error on the part of the District Judge. To place the procedural requirements of Rule 30 above the constitutional rights of petitioner, as did the Court below, is in effect a denial of due process of law. Surely, certiorari was not granted to Bruno because of the effect of the question on Bruno's rights alone. This Court, in that case, was of the opinion that an important question in the administration of criminal justice was involved. Yet if the right to which this Court held Bruno was entitled may be taken away by indirection it means that the doctrine of the **Bruno** case is no longer applicable except under an identical state of facts.

4. This Court, in denying certiorari, has no doubt overlooked the significance of the construction given to Rule 30 by the Court of Appeals in depriving petitioner and others similarly situated of trial according to the concepts of due process of law. If a defendant is entitled to choose whether an instruction with respect to the effect of his failure to testify should be given, how can he, in the ordinary case, make an intelligent choice until after counsel has argued the case? What the prosecutor says in the argument, and how he says it, is often of controlling effect in deciding whether it will benefit a defendant to have the jury told that his failure to testify shall not count against him. In the instant case, petitioner believed that what the Government attorneys said in their argument (R. 832, 835, 863)

constituted a derogatory comment on his failure to testify. Is it consonant with fairness and justice that petitioner should have anticipated that such argument would be made and that he should have made his choice on the matter of the instruction to the jury before counsel argued the case, under penalty of losing such right if the choice is not then made? To so hold is to deprive him of his right of choice to which he is entitled under the **Bruno** decision as well as the Fifth Amendment to the Constitution, and thereby he is deprived of a fair trial held in accordance with the American concept of due process.

Petitioner respectfully submits that this Court should reconsider its order of October 10, 1949, denying certiorari, because the questions involved are of great importance both in connection with the ever-increasing number of tax evasion prosecutions on the net worth-expenditure method and the proper construction of Rule 30 as applied to the Act of March 16, 1878, and Rule 52(b). It is submitted that where, as here, there is error concededly affecting a defendant's substantial rights, it cannot rightly be said that he has been justly and fairly convicted. The questions, however, do not merely concern the justice of petitioner's conviction. They are of general importance and must be decided by this Court if there is to be uniformity of decision and proper construction of the statutes and rules involved. The order denying certiorari should be set aside and certiorari granted.

Respectfully submitted,

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Attorneys for Petitioner.

CERTIFICATE OF COUNSEL.

We, Jerome F. Duggan, Robert Kratky, Morris A. Shenker, and Joseph Nessenfeld, counsel for petitioner herein, do hereby certify that the above and foregoing petition for rehearing is presented in good faith and not for delay, and we do further certify that the petition is restricted to intervening circumstances of substantial effect and other substantial grounds available to petitioner although not previously presented.

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